

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE
REGULATORY AUTH.

IN RE: APPLICATION OF MEMPHIS
NETWORKX LLC FOR A
CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO
PROVIDE INTRASTATE
TELECOMMUNICATIONS SERVICES
AND JOINT PETITION OF MEMPHIS
LIGHT GAS & WATER DIVISION, A
DIVISION OF THE CITY OF
MEMPHIS, TENNESSEE ("MLGW"),
A&L NETWORKS-TENNESSEE, LLC
("A&L") FOR APPROVAL OF
AGREEMENT BETWEEN MLGW
AND A&L REGARDING JOINT
OWNERSHIP OF MEMPHIS
NETWORKX, LLC.

01 MAR 1 AM 10 58
OFFICE OF THE
EXECUTIVE SECRETARY
DOCKET NO. 99-00909

HEARING BRIEF OF THE CONSUMER ADVOCATE AND PROTECTION
DIVISION AS REQUESTED BY THE TRA

Comes the Attorney General & Reporter of the State of Tennessee, through his Consumer Advocate and Protection Division, and hereby files this Brief as requested by the Tennessee Regulatory Authority ("TRA").

In this proceeding, Memphis Networkx LLC is requesting a Certificate of Convenience and Necessity ("CCN") from the Tennessee Regulatory Authority ("TRA") to offer telecommunications services in the Memphis area. Memphis Networkx LLC ("Memphis Networkx") is a joint venture consisting of two parties, Memphis Light Gas & Water ("MLGW"),

a publicly owned municipal utility, and Memphis Broadband LLC (“Memphis Broadband”), a privately owned entity. Memphis Broadband was not a party to the original application for the CCN, but became a party when it bought the interest of A&L Networks-Tennessee (“A&L”), another privately owned entity.

The Consumer Advocate and Protection Division intervened in this proceeding primarily in order to assure that MLGW put in place procedures that would prevent it from illegally subsidizing the joint venture with money from the ratepayers of the public utility (Tenn. Code Ann. § 7-52-402 prohibits municipalities from subsidizing the telecommunications operations of a public-private joint venture). Even though MLGW was slow in putting such procedures in place, it now appears that they have agreed to do so.

While participating in the hearing, the Consumer Advocate and Protection Division became concerned with two other issues in addition to the one about cross-subsidization. First, there was the issue of whether a “buy-out” or call-option provision that allowed the private part of the joint venture to buy out the interest of the public part was in the public interest. Second, there was an issue of whether the private part of the joint venture was capable of making its capital contribution as agreed to by the public and private parties. These concerns, however, appear to have been eliminated.

On the final day of the hearing (as originally scheduled), Thursday, October 18, 2000, Memphis Networkx announced that it was deleting the buy-out option from the Operating Agreement. See Hearing Exhibit 118. Accordingly, so long as the TRA is satisfied with the binding nature of the deletion of the buy-out option, and with the agreement of Memphis Networkx not to re-introduce a similar provision without approval from the TRA, the buy-out

provision is no longer an issue for the Consumer Advocate and Protection Division.

With regard to the issue of the financial capability of the new private party to the joint venture, it appears that Memphis Broadband is capable of making its required contributions. The Consumer Advocate and Protection Division, of course, reserves the right to ask questions on this issue at the hearing, and maintains that proof of financial capability is part of the applicant's burden of proof.

Thus, the intervention and preparation and participation of the Consumer Advocate and Protection Division has generally been focused on specific, limited issues. Accordingly, the response of the Consumer Advocate and Protection Division to the questions of the TRA will reflect this specific focus.

1. a. Do Tenn. Code Ann. § 65-25-231(a)(2) and § 7-52-402 apply to the Telecommunications Division of the Electric Division of Memphis Light Gas & Water?

Yes. Tenn. Code Ann. § 65-25-231(a)(2) and § 7-52-402 are intended to prevent cross-subsidies by public utilities. Insofar as these statutes are intended to prevent cross-subsidization by Memphis Light Gas & Water, the statutes also prevent cross-subsidization by any division or sub-division within that company.

Tenn. Code Ann. § 65-25-231(a)(2) provides as follows:

(2) Neither an electric cooperative nor any other entity participating in a telecommunications joint venture that provides such services may provide subsidies for such services. Notwithstanding the limitations set forth in the preceding sentence, an electric cooperative participating in a telecommunications joint venture may:

- (A) Dedicate a reasonable portion of the electric plant to the provision of such services, the costs of which shall be allocated to such services for regulatory purposes; and
- (B) Lend funds, at a rate of interest not less than the highest rate then earned by the electric cooperative on invested electric plant funds, to acquire, construct, and provide working capital for the system, plant, and equipment necessary to provide any such

services; provided, that such interest costs shall be allocated to the cost of such services for regulatory purposes.

Tenn. Code Ann. § 7-52-402 provides as follows:

7-52-402. Subsidies - Municipal costs.

A municipality providing any of the services authorized by § 7-52-401 shall not provide subsidies for such services. Notwithstanding the limitations set forth in the preceding sentence, a municipality providing such services shall be authorized to:

- (1) Dedicate a reasonable portion of the electric plant to the provision of such services, the costs of which shall be allocated to such services for regulatory purposes; and
- (2) Lend funds, at a rate of interest not less than the highest rate then earned by the municipality on invested electric plant funds, to acquire, construct, and provide working capital for the system, plant, and equipment necessary to provide any of the services authorized under § 7-52-401; provided, that such interest costs shall be allocated to the cost of such services for regulatory purposes. Any loan of funds made pursuant to this section shall be approved in advance by the state director of local finance and shall contain such provisions as are required by the state director.

In light of the text of these two statutes, it is clear that cross-subsidization by Memphis Light Gas & Water, or any division or sub-division thereof, is prohibited.

1. b. **Does Tenn. Code Ann. § 65-25-231(a)(2), § 7-52-402, or any other statute permit the equity investment in Memphis Networkx by the Telecommunications Division of the Electric Division of Memphis Light Gas & Water to Memphis Networkx LLC?**

The Tennessee Legislature has passed legislation allowing municipal utilities to form joint ventures with private parties. By its very nature, the joint venture business arrangement contemplates equity investments by the members. The critical issue, therefore, is assuring that the accounting practices of the municipal utility adequately set forth the investments for the public to see. Rightfully so, the Consumer Advocate and Protection Division and the TRA have carefully scrutinized Memphis Networkx's accounting practices in regard to this cross-subsidy issue.

2. Please identify and explain the criteria the Authority should use when approving an operating agreement under Tenn. Code Ann. § 7-52-103(d).

In reviewing the operating agreement at issue in this case the Authority should first of all apply the three criteria set forth in Tenn. Code Ann. § 65-4-201(c)(2), the statute governing applications for a CCN. Tenn. Code Ann. § 65-4-201(c)(2) requires that the “applicant possess sufficient managerial, financial and technical abilities to provide the applied for services.” Thus, if the operating agreement reveals incompetent management, inadequate financial resources, or lack of technical expertise, it should be disapproved.

In addition, the operating agreement must be in the public interest. Tenn. Code Ann. § 65-4-201(a) provides that the CCN should only be granted if there is evidence “that the present or future public convenience and necessity require or will require such construction, establishment, and operation” of the service at issue. See also Federal Express Corp. v. Tennessee State Bd. Of Equalization, 1985 Tenn. App. Lexis 2850 (Tenn. Ct. App. 1985) at 7 (“While the concept of a public utility is necessarily flexible, see Johnson City v. Milligan Utility Dist., 38 Tenn. App. 520, 276 S.W. 2d 748, 753 (1954), and depends on the circumstances in each case, Crown Enterprises, Inc. v. State Board of Equalization, 543 S.W.2d 583 (Tenn. 1976), one essential characterization is that the public have some right to regulate rates or demand service because the business in question is “affected with the public interest.” Foltz v. Indianapolis, 234 Ind. 656, 130 N.E.2d 650 (1955).”); In re Joint Petition of B.F. Walker, Inc., 1988 Tenn. App. Lexis 260 (Tenn. Ct. App. 1988) at 6 (“The interest of the public must be given predominant consideration, not that of competing carriers.”). Accordingly, the public interest is always a factor to be considered in any part of the application, including the operating agreement.

3. a. **Was Memphis Light, Gas & Water required to issue a Request for Proposal?**

The Consumer Advocate and Protection Division is unaware of any requirement that MLGW issue a request for proposal. There may, however, be internal MLGW policies on this issue that are best addressed by MLGW and Time Warner.

3. b. **What procedural requirements must Memphis Light Gas & Water follow when proceeding through the Request for Proposal process?**

The Consumer Advocate and Protection is not familiar with the requirements MLGW must follow in proceeding with Requests for Proposals. Accordingly, the Consumer Advocate and Protection Division does not have a position on this issue.

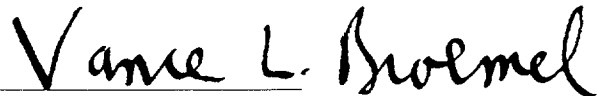
3. c. **Assuming Memphis Light, Gas & Water was not required to issue a Request for Proposal, was it bound to follow the procedural requirements discussed in the answer to b. once it chose to issue a Request for Proposal.**

See response to Item 3.b. above.

3. d. **Assuming Memphis Light, Gas & Water was required to issue a Request for Proposal, but failed to follow the requirements discussed in the answer to b., how is the transfer of interest from A&L Networks-Tennessee, L.L.C. to Memphis Broadband affected?**

See response to Item 3.b. above.

Respectfully submitted,



Vance L. Broemel, 11421
Assistant Attorney General
Consumer Advocate and Protection Division
John Sevier Building, 3rd Floor
425 5th Avenue North
Nashville, Tennessee 37243-0500
(615)-741-8700

Certificate of Service

I hereby certify that a true and correct copy of the Brief was served on parties below via U.S. Mail, postage prepaid, this March 1, 2001.

Knox Walkup, Esquire
Wyatt, Tarrant & Combs
2525 West End Avenue, Suite 1500
Nashville, Tennessee 37203-1423

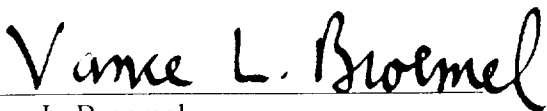
D. Billye Sanders, Esquire
Waller, Lansden, Dortch & Davis
511 Union Street, Suite 2100
P.O. Box 198966
Nashville, Tennessee 37219-8966

Guy Hicks, Esquire
BellSouth Telecommunication, Inc.
Suite Room 2101
333 Commerce Street
Nashville, Tennessee 37201-8062

Henry Walker, Esquire
Bolt, Cummings, Conners & Berry
411 Union Street
Suite 1600
P. O. Box 198602
Nashville, Tennessee 37219

Charles B. Welch, Esquire
Farris, Matthews, Branan, Bobango & Hellen, P.L.C.
618 Church Street, Suite 300
Nashville, Tennessee 37219

R. Dale Grimes, Esquire
Bass, Berry & Sims
2700 First American Center
Nashville, Tennessee 37238


Vance L. Broemel